1995

Shawn F. Reeves and Julie N. Reeves v. Thad B. Steinfeldt : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

OF THE STATE OF UTAH

SHAWN F. REEVES and JULIE N. REEVES,	:	
Plaintiffs Appellee/Cross-Appellants,	:	Case No. 950132-CA
vs.	:	Oral Argument Priority 15
THAD B. STEINFELDT dba STEINFELDT CONSTRUCTION,	:	
Defendant/Appellant/ Cross-Appellee.	:	

RESPONSE BRIEF OF APPELLEES AND BRIEF OF CROSS-APPELLANTS

Appeal from the Judgment of the Fourth Judicial District Court, Utah County, State of Utah, The Honorable Ray M. Harding

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JURISDICTION

Jurisdiction is at issue in this appeal and is fully briefed.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

1. Does this court have jurisdiction over this appeal when the notice of appeal was filed before a final order was issued by the trial court, and that final order disposed of what was arguably a Rule 59 motion?

There is no applicable standard of review, as this Court considers its own jurisdiction originally.

As to the merits, Reeves agree that this Court reviews all of the issues in this appeal de novo. Saunders v. Sharp, 840 P.2d 796, 802-03 (Utah Ct. App. 1992). Reeves differ, however, with Steinfeldt's framing of the issues, and to the degree Reeves differ they would frame them as follows:

2. Did the trial court correctly rule that Steinfeldt contractually bound himself as to when he could file a mechanics' lien, and that he breached that contract by filing prematurely?

3. Did the trial court correctly rule that Steinfeldt could not "cure" his defective filing with a subsequent filing?

4. Did the trial court correctly deny prejudgment interest to Steinfeldt?

5. Did the trial court correctly deny Steinfeldt attorney fees?

DETERMINATIVE STATUTES

Utah Rule of Appellate Procedure 4 (attached as Appendix 1). Other rules or statutes determinative of the appeal have been attached to the appellant's brief.

STATEMENT OF THE CASE

The case has been properly stated by the appellant, with the exception that this Court must consider whether it has jurisdiction over the appeal.

STATEMENT OF FACTS

Steinfeldt has chosen to state the facts as gleaned from select portions of the record. This is inappropriate. He chooses to interpret the record--the task of the trial court--rather than restate the facts as *found* by the trial court. He does this notwithstanding the fact that he has leveled no challenge whatsoever to the court's findings. See Docketing Statement of Defendant-Appellant (no mention of a factual challenge or statement of a clearly erroneous standard of review). This Court should disregard his references to the record, inasmuch as Steinfeldt has not marshalled the evidence as required to make an evidentiary challenge. See In re Estate of Bartell, 776 P.2d 885, 886 (Utah 1989). Reeves here restate the facts as found by the court (see R. 265-61).[1]

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[1] Part of this case was decided on summary judgment, which might suggest that the facts should be read in Steinfeldt's favor. However, the summary judgment only resolved whether the written contract between the parties was ambiguous, a legal task in any event. Thus, no factual challenges to the factual findings are before this Court.

Reeves owned property in Lindon, Utah, and Steinfeldt acted as the general contractor to build a home for Reeves on the property. After approximately the framing stage of construction, the parties discussed and reached a revised agreement dated August 9, 1993, as to Steinfeldt's work in constructing the home. The agreement was reduced to writing and stated:

> At close of house, Thad Steinfeldt will be paid $10,000 which will be payment in full for labor and services concerning Shawn & Julie Reeves' house at 53 W. 650 N. Lindon, Utah. This in addition to regular $300\week supervi sion fees and hourly wages of $20 approved in advance for any necessary changes. $14,000 contractor fee in loan is null and void.
>
> S/ T.B. Steinfeldt
> S/ S.F. Reeves

The agreement governed the method and time of Steinfeldt's compensation. Steinfeldt failed to complete the work as promised, and Reeves were forced to procure substitute performance to complete the house. Reeves had made all payments to Steinfeldt required by their agreement through the date of the last draw in October, 1993.

On November 5, 1993, Steinfeldt filed a lien against Reeves' property in the sum of $17,929. Because Steinfeldt had placed the lien on the property, Reeves were required to escrow 150% of the lien amounts in order to close their long-term financing. Steinfeldt amended the lien on or about December 22, 1993, reducing the claimed amount to $12,764.19, and a portion of the escrowed funds were released. Reeves' damages were found to include labor

charges for Steinfeldt's replacement and interest on the extra escrow monies.

After having filed an amended complaint, Reeves moved for partial summary judgment. The court granted Reeves' motion and ruled that the language of the written agreement of August 9, 1993 (1) voided any prior agreements between the parties; (2) was clear and unambiguous, and (3) it should be enforced as written. R. 196. After trial, the court concluded that while Steinfeldt was entitled to the benefit of the August 9 agreement, he had filed the lien in excess of his entitlement, and his filing was premature inasmuch as Steinfeldt was to be paid at the time of closing and not sooner. R. 235, 307.

SUMMARY OF ARGUMENT

I. This Court lacks jurisdiction. Steinfeldt filed two motions after issuance of the trial court's memorandum decision. Steinfeldt then filed his notice of appeal before the trial court had disposed of those motions, and thus the notice of appeal was premature and had no effect. The same is true for the extension for time to file a notice of appeal: one cannot extend the time to file something that cannot yet be filed.

II. A mechanic's lien, like any other lien, requires both attachment and perfection. Attachment occurs automatically through the statute, but perfection requires filing by the lienor. The statute provides for a "window" of time when that perfection can occur. That window begins with the "substantial completion" of the

work and, under the statute in this case, ended eighty days later. The trial court made a correct and critical distinction between an agreement which would bar a lien entirely and an agreement which would determine the time from which the eighty-day window of opportunity would run. The trial court called the agreement a "limited lien waiver" because it affected the time when the lien could be filed. Under general principles of law, no lien may be properly filed until payment is due. Payment is normally due when the work is substantially complete and accepted by the owner, but when, as here, the payment due date is changed, the right to file a lien begins when payment is due and has not been made. It would be absurd to think that a contractor could file a lien to recover monies which were not yet due.

Here the parties contracted as to the time for payment in a perfectly permissible way. Steinfeldt breached that contract by filing his lien prematurely and for an excessive amount. His subsequent filing of a second lien did not "cure" the original filing, as the statute does not contemplate such a "cure", and, in any event, the work had not yet been accepted by Reeves.

III. Steinfeldt cannot recover attorney fees because he is not the prevailing party. There can be only one prevailing party under the statute, and the trial court deemed Reeves the prevailing party.

IV. Steinfeldt may not recover prejudgment interest. Prejudgment interest is only available for those debts whose exact

amount is subject to determination by the factfinder. Here, the amount due Steinfeldt was disputed and eventually determined by the factfinder. Thus, no prejudgment interest may be awarded.

ARGUMENT

I. Steinfeldt Filed His Notice of Appeal Prior To Disposition of a Post-Trial Motion and, Therefore, This Court Has No Jurisdiction Over This Appeal.

Before responding to Steinfeldt's substantive issues, Reeves must first raise a challenge to this Court's jurisdiction. A jurisdictional argument can be raised at any time, even at oral argument. Swenson Associates Architects v. Utah, 889 P.2d 415 (Utah 1994).

The challenge to jurisdiction is predicated on the timing of Steinfeldt's notice of appeal, which was filed before the trial court's disposition of a Rule 59 motion. A chronology of this case's docket is necessary to an understanding of the jurisdictional issues:

1. September 12, 1994. Memorandum decision issued in which Reeves' motion for partial summary judgment is granted, counsel to prepare an appropriate order. R. 196.

2. October 17, 1994. Memorandum decision issued after trial in favor of Reeves. Reeves' counsel to prepare an appropriate order. R. 235.

3. October 25, 1994. Steinfeldt's "Motion for Reconsideration" is filed. R. 238.

4. November 4, 1994. Judge Harding signs the Judgment and Findings of Fact and Conclusions of Law. R. 261, 266.

5. November 8, 1994. Steinfeldt's Objection to Plaintiff's Proposed Findings of Fact and Conclusions of Law filed. R. 272.

6. December 2, 1994. Judge Harding signs an Order granting Steinfeldt's ex parte motion for an extension of time to file notice of appeal. R. 296.

7. December 8, 1994. Judge Harding issues a Memorandum Decision denying Steinfeldt's Motion for Reconsideration. Reeves' counsel to submit an appropriate order. R. 298.

8. December 27, 1994. Notice of appeal filed. R. 306.

9. January 3, 1995. Judge Harding signs an Order disposing of Steinfeldt's Motion for Reconsideration and Objection. R. 307.

Utah Rule of Appellate Procedure 4(a) provides that a notice of appeal filed while a Rule 59 motion is pending has no effect and does not take effect upon disposition of the motion. Here the motion for reconsideration and the objections to the findings of fact and conclusions of law were treated by the trial court as Rule 59 motions, and thus the ex parte extension of time to file a notice of appeal was ineffectual.

In this case a "Motion for Reconsideration", brought ostensibly under Rule 54 (see R. 246 (supporting memorandum citing Ron Shepherd, a Rule 54 case)), was filed after announcement of the trial court's decision but before the signing of the final order. However, when the court issued its final order on November 4, 1994,

it did so without disposing of the outstanding motion. Despite Steinfeldt's styling of his motion as a rule 54 motion, the court's December 17, 1994 Order removed any doubt that the court did not consider the motion to be a Rule 54 motion, but rather a Rule 59 motion. The court did not dispose of the motion for reconsideration until after the December 17 Order had been signed. The Court, therefore, treated the motion as a Rule 59 motion.

Even if the motion for reconsideration was not a Rule 59 motion, Steinfeldt's "objection", filed four days after the entry of the court's November 4 Order, was clearly a Rule 59 motion. "Regardless of how it is captioned, a motion filed within ten days of the entry of judgment that *questions the correctness of the court's findings and conclusions* is properly treated as a post-judgment motion under either Rules 52(b) or 59(e)." Debry v. Fidelity Nat'l Title Ins. Co., 828 P.2d 520, 522-23 (Utah Ct. App. 1992)(emphasis supplied); see Watkiss & Campbell v. Foa & Son, 808 P.2d 1061 (Utah 1991); Brunetti v. Mascaro, 854 P.2d 555, 557 (Utah Ct. App. 1993).

Given these facts, Steinfeldt could not have timely filed his notice of appeal until January 3, 1995, or within thirty days after that date. Swenson Associates Architects v. Utah, 889 P.2d 415 (Utah 1994).[2] This result is unchanged notwithstanding Steinfeldt

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[2] This is true even considering Judge Harding's granting of the extension of time to file the notice of appeal. The notice was ineffective given the pending post-judgment motion. Because Steinfeldt did not file a timely notice of appeal, his appeal must be dismissed. See U.R.A.P. 2 (provisions of Rule 4(b) may not be suspended).

not receiving actual notice that its motion may still have been pending. When a time period runs from the time of filing, *actual notice is irrelevant*. Since the court's docket is a public record, a party is *always* on constructive notice of a filing. Steinfeldt therefore knew from the contents of the Order that a motion was pending, and if he did not, he could have requested a clarification from the court or, more simply, filed his notice of appeal and then diligently checked with the clerk's office, every day if need be, to ensure that the court filed no further dispositive orders that could be treated as final. Notice of an order is not required for the time for filing a notice of appeal to accrue. See U.R.C.P. 58A(d)("The prevailing party shall promptly give notice of the signing or entry of judgment to all other parties and shall file proof of service of such notice with the clerk of the court. *However, the time for filing a notice of appeal is not affected by the notice requirements of this provision*.")(emphasis supplied); Workman v. Nagle, 802 P.2d 749 (Utah Ct. App. 1990).

It was Steinfeldt's duty to determine whether the motions he filed may have been disposed of upon entry of what was styled a final order. When there is any doubt as to whether a motion remains outstanding, the party filing the motion has the burden of requesting a ruling or for an extension of the time to appeal. That is what this Court and the Supreme Court have required. See, e.g., Swenson Associates Architects v. Utah, 889 P.2d 415 (Utah 1994). Steinfeldt did not do this, and his appeal must be dismissed.

II. Steinfeldt Did Not "Waive" His Right To File a Mechanic's Lien, But Rather Contractually Fixed the Time For Filing a Lien, and Then Breached the Contract by Prematurely Filing.

Steinfeldt argues that the trial Court found the August 9 agreement to be a "waiver" of his right to file a mechanic's lien. The trial court did not so hold. Steinfeldt did not waive his right to file a lien: he simply contracted as to the time he could file a lien, and his right to file a lien was therefore only impaired in a limited fashion, if at all. Steinfeldt confuses his right to file a lien at all with his right to file a lien *at a particular time*. The statute prescribes both rights: one may file a lien, and one has a particular "window" of time in which to do so. Steinfeldt willingly defined the borders of that window by contract, but still retained the right to file a lien.

A. Steinfeldt Did Not Waive His Right to File a Lien, But Rather Fixed the Date He Could File a Lien.

The mechanic's lien statute applicable to this action states that "Each contractor or other person who claims benefits under this chapter within 80 days after substantial completion of the project or improvement shall file for record with the county recorder . . . a written notice to hold and claim a lien." Utah Code Ann. § 38-1-7 (1993). Steinfeldt contracted to fix the date on which he could file a lien--the closing date. Furthermore, the statute states that a lien may not be filed until after "substantial completion" of the project or improvement. Substantial completion obviously means "completion", as in all work being completed. Nagle v. Club Fountainbleu, 405 P.2d 346 (Utah

1965)(date of "completion" disputed; date of completion was crucial date for commencing statutory period to file lien). But the date of "substantial completion" also means the date when only minor or trivial work remains to be accomplished, Interiors Contracting v. Smith, Halander & Smith, 827 P.2d 963, 965 (Utah Ct. App. 1992); Daniels v. Deseret Federal Savings & Loan Ass'n, 771 P.2d 1100, 1102 (Utah Ct. App.), cert. denied, 781 P.2d 878 (Utah 1989). Furthermore, the requirements for filing a lien are not satisfied until the owner has accepted the lienor's work. Interiors Contracting, 827 P.2d at 965.

The trial court correctly held that Steinfeldt breached the contract it made by prematurely filing a mechanic's lien before the closing date (the date of substantial completion).[3] The exact language of the trial court's ruling is significant. It ruled that the written agreement constituted a "limited lien waiver." The word "limited" is important. The court obviously doubted whether specifying the date of payment could constitute a "waiver" of the right to place a mechanics' lien. Steinfeldt ignores the limitation the court placed on the term "waiver", and spends much

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[3] Steinfeldt has also argued that by contractually fixing the date of payment at closing, a contractor could end up with no right of lien because closing occurred more than 90 days after "substantial completion." The term "substantial completion" is a benchmark, subject to judicial interpretation so that the statute makes sense. If, as here, the parties in Steinfeldt's hypothetical simply intend to fix a lien's time of perfection, then it offends reason to think that the term "substantial completion" would mean anything but closing. The parties can always contract for when "substantial completion" occurs. Here, that time was closing.

time discussing general waiver when general waiver was not really at issue ion this case.[4]

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[4] Reeves recognize that Steinfeldt has spent a great deal of time on this issue, and so addresses it here in a footnote. Even if the modification were deemed a "waiver", it was still binding. Steinfeldt suggests that the modification was improper in form (it was not "express"). However, all of the cases that Steinfeldt cites concern total waivers, not situations where one is simply proscribed from filing one's lien until a certain time and to a certain amount. Steinfeldt was free to file a lien within such parameters, and admits as much: "Steinfeldt, by agreement, *was not going to be paid until the closing of the Reeves' home*, and to protect such payment filed a notice of mechanic's lien . . . ." Brief of the Appellant at 13 (emphasis supplied). He never says he could not file a lien at the appropriate time. Steinfeldt argues that he is entitled, on public policy grounds, that because he is nervous about payment before completion of the house, he is entitled to file a lien. Such conduct is most assuredly *against* public policy and is an abuse of a statutory lien.

Furthermore, no Utah authority speaks to whether waiving the right to file a mechanics' lien must be express in the sense that they must say "this a waiver of your lien." Steinfeldt has cited Utah authority that a waiver of lien must be clear and unambiguous, as any waiver must. The only mechanics' lien case he cites is Mine and Smelter Supply Co. v. General Ins. Co. of America, 471 P.2d 154 (Utah 1970), which is not in point: that case discussed an incredible latent ambiguity (the work performed could not enjoy a lien because the work was on a public building). Here the agreement was unambiguous: Steinfeldt agreed on price and timing as clear new terms. There was no ambiguity to the agreement.

The cases Steinfeldt cites from Colorado and Oregon do not change this conclusion. See Ragsdale Bros. Roofing v. United Bank, 744 P.2d 750, 754-55 (Colo. Ct. App. 1987); Harris v. Dyer, 623 P.2d 662, 665 (Or. Ct. App. 1981). Accepting *arguendo* these authorities as binding on Utah courts, they do not help Steinfeldt. Harris is illustrative. That court held that an arbitration clause could not constitute an express waiver because liquidating the debt (the task of arbitration) was not the same as collecting it (the task of a lien). Thus, agreeing to arbitration does not mean one waives the ways in which to enforce the arbiter's judgment. Here, Steinfeldt agreed in the August 9 contract to a specific date to fix *both* the amount due him and the time when he could collect that amount. Because the agreement constitutes a temporary forbearance of the right to record a mechanics' lien, it is an express waiver of the right to record the lien at the earliest moment that might be allowed under the statute.

Steinfeldt seems to argue that for a waiver to be effective, it must spell out the applicable law of mechanic's liens, including the timing requirements of those liens. For the agreement here to be

Indeed, it is more sensible to speak of the August 9 agreement as a modification, and not a waiver, of Steinfeldt's rights. The ways in which one may modify one's rights to use or forebear from using the remedy of a mechanics' lien are not limited, just as the ways in which one may contract are not limited. See 53 Am. Jur. 2d *Mechanics' Liens* § 334 (1970); see First of Denver Mortgage Investors v. C.N Zundel, 600 P.2d 521, 527 (Utah 1979). This approach makes sense given that the court's ruling labeled the written agreement as a "limited" lien waiver.

B. Steinfeldt Breached the Contract by Filing His Lien Prematurely.

The timing requirements of the statute clearly contemplate a "window" in which liens can be filed. The window is defined on one side as the date of substantial completion, and on the other as the expiration of the 80 days. Were this not so, no one would argue whether work had been substantially completed, as that date would have little relevance: a contractor could walk off the job at any time and file his lien, whether there had been substantial completion or not. Steinfeldt argues that "[t]here is no statutory prohibition that would restrain the laborer from filing a notice of

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unambiguous in the sense that Steinfeldt suggests, it would not only have had to say that payment was due at the time of closing, but also say something like "Now, you realize that the Utah code allows you to file a lien only when payment is due you, and that such time now means the closing (or, in any event the date of substantial completion). So, you cannot file your lien until closing or substantial completion (which here are essentially the same), and you will be limited to the amount agreed upon." Requiring such surplusage is ludicrous and simply not necessary.

lien on the first day work is performed--long before the eighty (80) day period starts to run." Brief of the Appellant at 17. Steinfeldt is wrong: the statute would be self-contradictory without such a prohibition. The prohibition is implicit. The date of substantial completion commences the period in which a filing may occur. Interiors Contracting v. Smith, Halander & Smith Assocs, 827 P.2d 963, 965 (Utah Ct. App. 1992)("A contract is 'completed' and the 100-day filing period begins to run when the work has been 'substantially completed,' leaving only minor or trivial work to be accomplished, and 'has been accepted by the owner.'"); Daniels v. Deseret Federal Savings & Loan, 771 P.2d 1101, 1102 (Utah Ct. App.)("A general contractor must record a mechanic's lien within 100 days after completion of the contract."), cert. denied, 781 P.2d 878 (Utah 1989).

When Steinfeldt filed his lien on the Reeves property, there had been no substantial completion of the construction for which he had been hired. The parties chose the day of closing as the day on which Steinfeldt would be paid. Their choice made sense, for even absent a contract, the day of closing is a convenient and reliable date for fixing substantial completion. Closing did not occur until after November 5, 1993. It violates common sense to suppose that Steinfeldt could decree the date of substantial completion as the date he quit working on the job: such would mean that the date of substantial completion means the date of breach. In any event,

Reeves had not accepted Steinfeldt's work before he filed the lien. His filing was therefore premature.

C. The Lien Was Recorded Wrongfully Because It Overstated the Amount Due Steinfeldt.

In arguing that he was justified in claiming more than the agreement allowed, Steinfeldt insists on ignoring the payment terms of the agreement. Steinfeldt obviously refuses to be bound by his contractual obligations. He has argued that the payment date did not apply to him. Next he disputes the amount owed him. The trial court did not condone this approach, and when crafting its remedy it held Steinfeldt to the contract. As noted before, the court deemed the agreement a "limited" waiver of Steinfeldt's right to file a lien, limited because it only proscribed the timing and amount of payment on which a lien could be predicated. Steinfeldt was bound by these contractual obligations in addition to the safe harbor requirements of the mechanic's lien statute that he cites in his brief. Violating either the statutory or contract requirements constituted wrongful conduct, and the trial court so ruled.

D. The Amended Filing Did Not Cure The Original Filing, and There Was no Acceptance by Reeves.

For the same reason that the original filing was premature, the second "amendment" to the filing was invalid. Steinfeldt appears to contend that the amended filing in some way "cured" the defect of the original filing because the amendment took place after payment was due. This is not so, for several reasons. The amended lien still claimed an amount in excess of what was due.

Even were the amended lien not excessive and based on the parties' binding understanding, there is no authority that a wrongfully filed lien can be "cured" in such a manner. Under a plain reading of the statute, the wrongfully filed lien must be withdrawn, and a new lien filed in full accordance with the statute. Furthermore, "curing" the lien, even if this were possible, does not remedy the damages suffered by the Reeves in having to deal with the wrongfully filed lien of November 5, 1993. Steinfeldt's post hoc attempt to cure the lien cannot insulate him from damages arising from the original slanderous filing. Lastly, the threshold requirement that the Reeves accept Steinfeldt's work, Interiors Contracting v. Smith, Halander & Smith Assocs, 827 P.2d 963, 965 (Utah Ct. App. 1992), had still not been fulfilled at the time of the amendment, and therefore the period for filing had not yet begun. The amendment cured nothing.

III. Steinfeldt Is Not Entitled to Prejudgment Interest.

Steinfeldt claims prejudgment interest on the amount due him. Beyond a general prayer for "interest" in his Counterclaim (Appendix 6), Steinfeldt never raised the issue of prejudgment interest with the district court, neither at trial nor in his motion for reconsideration. This issue should be disregarded because it was waived.

Even were the issue validly before this Court,

> [t]he law on this issue is clear: "'[W]here the damage is complete and the amount of loss is fixed as of a particular time, and that loss can be measured by facts and figures, interest should be allowed from that time .

> . . and not from the date of judgment. on the other hand, where damages are incomplete or cannot be calculated with mathematical accuracy, such as in the case of personal injury, wrongful death, defamation of character, false imprisonment, etc., the amount of the damages must be ascertained and assessed by the trier of fact at the trial, and in such cases prejudgment interest is not allowed.'"

Cornia v. Wilcox, 267 U.A.R. 40, 44 (Utah June 28, 1995)(quoting Canyon Country Store v. Bracey, 781 P.2d 414, 422 (Utah 1989)(quoting First Security Bank of Utah v. J.B.J. Feedyards, 653 P.2d 591, 600 (Utah 1982))).

In Cornia the court denied prejudgment interest when the factfinder was charged with using "its best judgment in ascertaining and assessing the damages." Id. That is what Judge Harding did here with respect to Steinfeldt's damages. The amount due Steinfeldt was disputed. The origin of the dispute centered on whether Steinfeldt had completed the job, and so it was disputed whether the entire $10,000 fee enumerated in the contract was due. R. 339-40, 398-99. Other disputed figures included the number of supervisory hours to be charged, R. 335-36, 338, 339-40, 398-99, and what expenses were compensable. R. 339-40. Judge Harding's Findings of Fact specifically addressed and resolved these disputes. R. 263 (Finding 12).

IV. Steinfeldt Is Not Entitled to Attorney Fees.

Steinfeldt argues that he is entitled to attorney fees under the statute. He is wrong. Steinfeldt is only entitled to fees if he is a successful party in an action to enforce a mechanics' lien. Utah Code Ann. § 38-1-18. Steinfeldt has not been granted the

right to foreclose on his lien, nor has he been awarded any damages. The only reason he is still a creditor of Reeves is that their damages did not completely swallow up the debt they owed to him. The district court expressly found that Reeves were the prevailing parties, and that they were entitled to "deduct" from their debt to Steinfeldt their damages and attorney fees. R. 261-63. The award of attorney fees to Reeves as a defending successful party was permissible under the statute. Palombi v. D & C Builders, 452 P.2d 325 (Utah 1969); see also Mountain States Broadcasting Co. v. Neale, 783 P.2d 551, 555-56 (Utah Ct. App. 1989)(there is usually only one prevailing party when a "prevailing party" is entitled to attorney fees). The district court awarded nothing to Steinfeldt, and by no means can the outstanding debt to Steinfeldt be considered a judgment for purposes of the statute: it was merely an outstanding debt against which Reeves' judgment was a setoff. Indeed, Steinfeldt has failed to attack the district court's discretion in awarding fees to Reeves (in his brief and docketing statement he does not cite abuse of discretion as the applicable standard of review), and instead chooses to quarrel with the district court's interpretation of the statute in arguing that the statute contemplates there being two prevailing parties. As noted, such a statutory interpretation is clearly wrong. The award to the Reeves--and lack of award to Steinfeldt--was proper and ought to be upheld.

CROSS-APPEAL

JURISDICTION

Jurisdiction is a contested issue in this cross-appeal, and is addressed in the argument.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

1. Does this court have jurisdiction over this cross-appeal because the final order was not issued in the trial court until January 3, 1995, and the notice of cross-appeal was filed January 11, 1995, within the time period prescribed for filing a notice of appeal or cross-appeal?

There is no standard of review applicable to this issue, since this Court originally reviews its own jurisdiction.

2. Did the court clearly err when it awarded as the "cost of escrowing monies for lien" only $403, when the evidence adduced at trial shows "cost of escrowing monies for lien" to be over $2,000, and there is no basis in the record whatsoever for an award of $403 for this category of damages.

Questions of damages are inherently factual, and can only be reversed by an appellate panel if clearly erroneous. U.R.C.P. 52(a).

3. Is it clear error if a court fails to award damages for the delay in closing due to conduct determined to be wrongful when the evidence of such damages was uncontroverted?

Questions of damages are inherently factual, and can only be reversed by an appellate panel if clearly erroneous. U.R.C.P. 52(a).

DETERMINATIVE STATUTES

Utah Rule of Appellate Procedure 4 (attached as Appendix 1). There are no other rules or statutes determinative of the cross-appeal.

STATEMENT OF THE CASE

A. Nature of the Case.

As a threshold matter, the jurisdiction of this court over this cross-appeal is at issue. As for the substance of the cross-appeal, a verdict was entered in favor of Reeves, and they now contest the propriety of the damage award.

B. Proceedings Below.

The case was tried to the bench, and the trial court ruled on liability and damages in favor of Reeves. Reeves now contest the damage award.

STATEMENT OF FACTS

The procedural facts relevant to the jurisdictional issue have already been stated in the body of the response brief. As for the substance of the cross-appeal, the relevant facts concern the damages awarded by the trial court. At the conclusion of the trial, the trial court awarded Reeves the following damages:

Cost of Finishing Construction	$1,100.00
Cost of escrowing monies for lien	$403.00

Attorneys Fees $6,242.50

(R. 263).

The category of "Cost of escrowing monies for lien" states an award of $403. Evidence presented at trial indicates that such charges actually amounted to $1,842.20. Reeves introduced evidence that the delay in closing the long-term financing caused by defendant's conduct which the court found to be wrongful was $403 (the difference between the construction loan interest and the long-term loan interest during the period of delay in closing). That category of damages was not included in the trial court's decision and judgment.

SUMMARY OF THE ARGUMENT

I. There were a number of objections and motions filed below after trial. These were timed such that a final disposition in this case was not entered until January 3, 1995. Because Reeves filed their notice of cross-appeal on January, 11, 1995, they were well within any relevant window for filing such notice. Their cross-appeal should be heard, and if the appeal is dismissed, the cross-appeal should be heard as an appeal.

II. The trial court awarded $403 in damages as the cost of escrowing money to cover the wrongfully filed lien. There is no basis whatsoever in the record for this award, as the evidence adduced indicates a sum of $1,842.20 for these damages.

III. Evidence was presented that Reeves suffered $403 in damages for the 10-day delay in closing caused by the wrongfully-

filed lien. The court did not award these damages, despite the fact that the evidence supporting them was uncontroverted. This was clear error.

ARGUMENT

I. This Court has Jurisdiction Over Reeves' Cross-Appeal.

This Court raised its jurisdiction over Reeves' cross-appeal sua sponte, and dismissed the cross-appeal on the grounds that the notice of cross-appeal was not filed within ten days of the December 27 notice of appeal. The Court has now opted to revisit the issue and allow it to be fully briefed, given the chronology of the post-trial motions discussed above. Given that chronology, a final order disposing of this case was not filed until January 3, 1995. That means that the period for filing a cross-appeal (accepting that a valid notice of appeal was filed) began to run on January 3, 1995. U.R.A.P. 4(d)("[A]ny other party may file a notice of appeal . . . within the time otherwise prescribed by paragraph (a) of this rule . . . ."). The notice of cross-appeal was filed on January 11, well within the time limit for filing a notice of appeal or cross-appeal. Thus, the notice of cross-appeal should be deemed timely and the cross-appeal reinstated, and, if the appeal is dismissed, the cross-appeal should be treated as an appeal.

II. The Trial Court's Award of $403 in Damages for Cost of Escrowing Money Should Have Been an Award for the Delay in Closing, and $1842.20 Should Have Been the Award for Cost of Escrowing Money.

When challenging a factual finding, an appellant is required to marshal all of the evidence at all relevant to the issue challenged, including evidence contrary to the appellant's position. In re Estate of Bartell, 776 P.2d 885, 886 (Utah 1989). The evidence relevant to the issue of damages for escrow costs and closing delay concerned the amount the Reeves were required to escrow, the amount of interest charged the Reeves for setting that money into escrow, and the amount of excess interest incurred because of the closing delay. The portions of the record concerning these damages follow:

1. Plaintiff's Exhibit 2. Notice of Lien.

2. Plaintiff's Exhibit 3. Amended Notice of Lien.

3. Plaintiff's Exhibit 7. This indemnity agreement between Reeves and Steinfeldt provides that no liens will encumber the house at closing.

4. Plaintiff's Exhibit 8. This is an Escrow Agreement providing that the Reeves are to deposit $26,893.50 into escrow with Security Title and Abstract. The escrow was required because of the presence of the lien on the Reeves property.

5. Plaintiff's Exhibit 9. This Settlement Statement reflects the escrow amount as item 109.

6. Plaintiff's Exhibit 10. This check in the amount of $7,747.22 was issued to Reeves after Steinfeldt reduced his claim in the "amended" lien.

7. Plaintiff's Exhibit 20. These cash advance receipts reflect the source of a portion of the escrowed monies. Reeves borrowed the money to produce the escrowed funds.

8. Examination of Julie Reeves (R. 346-350, 358-359). Abstracted: presence of lien required more time with and trips to title company and bank; required escrowing 1.5 times lien amount (foundation for Exhibits 8, 9, 7,); $16,500 was borrowed from Security Pacific, and remainder was borrowed from Reeves' business (foundation for Exhibit 20).

9. Examination of Shawn Reeves (R. 396-398). Abstracted: amount of finance charges on borrowed escrow monies was $1842.20. The amount $403 was finance charge for delay in closing.

10. Closing Argument of Reeves (R. 516-517).

11. Closing Argument of Steinfeldt (R. 528).

The evidence clearly shows that the amount claimed as interest on the escrowed monies was $1,842.20, not $403. The $403 was the amount of damages incurred for the delay in closing. The testimony concerning the $403 amount and the $1,842.20 was close in proximity: that proximity may have been the cause of the trial court's confusion of the amounts. The fact remains, however, that the court awarded the incorrect amount as interest on the escrowed monies. The error is not only clear: it is obvious and easily

explicable. For this reason the Court should vacate the $403 award and remand to the trial court, instructing it to award the Reeves $1,842.20 as damages for escrowing the money in question.[5] Likewise, the trial court should have awarded the $403 in a separate category "damages caused by delayed closing". The remand should therefore also include an instruction to the trial court to award such damages, evidence of which was completely uncontroverted.

CONCLUSION

Steinfeldt's appeal should not be before this Court. He filed his notice of appeal prematurely, committing an error fatal to this Court's jurisdiction. If he is properly before the Court, then his appeal has no merit. He filed a mechanic's lien before the statutorily-prescribed window created for doing so. He claims he could file at any time, but in so arguing confuses the right to assert a claim with the statutory prescription of the right to file a lien. He contractually bound himself as to the amount of his claim and when he could assert that claim in the form of a lien.

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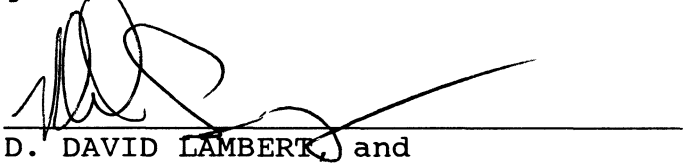
[5] The figure $1,842.20 was undisputed at trial. At the time of trial the interest on the escrow money was still accruing, as the lien had not yet been released. There would be a variety of ways to compute the interest on the $16,500 in question, including the most obvious method of using the interest rates quoted on the Security Pacific statements (Exhibit 20). One could also use the statutory rate. Given that there was no evidence as to the method of computation, however, and the fact that the $1,842.20 figure was uncontested, that figure was the sole evidence of the amount of interest due and should have been accepted as such. To figure other amounts using various computation methods (or to try to discern the origin of the $1,842.20) would be mere speculation.

The closing date was fixed as the time for payment, and that date was also the time of substantial completion for purposes of commencing the filing window. His filing was premature and excessive, and caused Reeves substantial damages. His subsequent filing did not constitute a cure of the original, as there is no authority for such a "cure" and, in any event, Reeves had not accepted his work at the time of the amended filing.

Reeves cross-appeal is properly before this court because of the timing of the post-trial motions filed below, and should be treated as an appeal should Steinfeldt's appeal be dismissed. The Reeves damages were unduly diminished by the trial court when it awarded them only $403 for the cost of escrowing money to cover the lien and failed to award anything under the category of damages caused by delayed closing. No evidence below supported such a finding, the only amount adduced being $1,842.20 for cost of escrowed money and $403 for delayed closing. That is the amount the Reeves should receive in addition to the other damages properly awarded them.

DATED this 15th day of August, 1995.



D. DAVID LAMBERT, and
PHILLIP E. LOWRY, for:
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Attorneys for Plaintiffs

CERTIFICATE OF MAILING

I hereby certify that two true and correct copies of the foregoing were mailed, postage pre-paid, to the following this 15th day of August, 1995.

William M. Jeffs, Esq.
Jeffs & Jeffs
P.O. Box 888
Provo, UT 84603

_____
ATTORNEY

APPENDIX

Utah Rule of Appellate Procedure 4

son might appeal as matter of right. Jensen v. Nielsen, 22 Utah 2d 23, 447 P.2d 906 (1968).

Order denying a motion for summary judgment was not a final order and was not appealable. Denison v. Crown Toyota Motors, Inc., 571 P.2d 1359 (Utah 1977).

A summary judgment in favor of one defendant alone is not a final judgment where the action against the remaining defendant remains alive. Neider v. State DOT, 665 P.2d 1306 (Utah 1983).

Unsigned minute entry.

An unsigned minute entry did not constitute an entry of judgment, nor was it a final judgment for purposes of appeal. Wilson v. Manning, 645 P.2d 655 (Utah 1982); Utah State Tax Comm'n v. Erekson, 714 P.2d 1151 (Utah 1986); Sather v. Gross, 727 P.2d 212 (Utah 1986); Ahlstrom v. Anderson, 728 P.2d 979 (Utah 1986).

An unsigned minute entry does not constitute a final order for purposes of appeal. State v. Crowley, 737 P.2d 198 (Utah 1987).

Cited in Huston v. Lewis, 818 P.2d 531 (Utah 1991); Boggs v. Boggs, 824 P.2d 478 (Utah Ct. App. 1991).

COLLATERAL REFERENCES

A.L.R. — Appealability of order suspending imposition or execution of sentence, 51 A.L.R.4th 939.

Rule 4. Appeal as of right: when taken.

(a) **Appeal from final judgment and order.** In a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from. However, when a judgment or order is entered in a statutory forcible entry or unlawful detainer action, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 10 days after the date of entry of the judgment or order appealed from.

(b) **Motions post judgment or order.** If a timely motion under the Utah Rules of Civil Procedure is filed in the trial court by any party (1) for judgment under Rule 50(b); (2) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) under Rule 59 to alter or amend the judgment; or (4) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. Similarly, if a timely motion under the Utah Rules of Criminal Procedure is filed in the trial court by any party (1) under Rule 24 for a new trial; or (2) under Rule 26 for an order, after judgment, affecting the substantial rights of a defendant, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order of the trial court disposing of the motion as provided above.

(c) **Filing prior to entry of judgment or order.** Except as provided in paragraph (b) of this rule, a notice of appeal filed after the announcement of a decision, judgment, or order but before the entry of the judgment or order of the trial court shall be treated as filed after such entry and on the day thereof.

(d) **Additional or cross-appeal.** If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by paragraph (a) of this rule, whichever period last expires.

(e) **Extension of time to appeal.** The trial court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by paragraph (a) of this rule. A motion filed before expiration of the prescribed time may be ex parte unless the trial court otherwise requires. Notice of a motion filed after expiration of the prescribed time shall be given to the other parties in accordance with the rules of practice of the trial court.

No extension shall exceed 30 days past the prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

NOTES TO DECISIONS

ANALYSIS

Administrative actions.

Subdivision (c) does not apply to petitions for review of administrative actions. Maverik Country Stores, Inc. v. Industrial Comm'n, 860 P.2d 944 (Utah Ct. App. 1993).

Attorney fees.

No cross-appeal is necessary where plaintiffs merely sought attorney's fees incurred in defending their judgment on appeal. Wallis v. Thomas, 632 P.2d 39 (Utah 1981).

Cross-appeal.

Subdivision (d) requires that a notice of cross-appeal be timely filed. Absent a cross-appeal, a respondent may not attack the judgment of the court below. Henretty v. Manti City Corp., 791 P.2d 506 (Utah 1990) (decided under former R. Utah S. Ct. 4).

Extension of time to appeal.

Neither Rule 6(b), U.R.C.P., granting the court power to extend a time limit where a failure to act in time is due to excusable neglect generally, nor Rule 60(b)(1), U.R.C.P., authorizing the court to relieve from final judgment for inadvertence or excusable neglect, applies where a notice of appeal has not been timely filed. Holbrook v. Hodson, 24 Utah 2d 120, 466 P.2d 843 (1970).

A party could not extend the time for filing an appeal simply by filing a "Motion for Reconsideration of Order Striking Petition and Motion for Relief from Final Judgment." Peay v. Peay, 607 P.2d 841 (Utah 1980).

When the question of "excusable neglect" arises in a jurisdictional context, as opposed to a nonjurisdictional context, the standard contemplated thereby is a strict one; it is not meant to cover the usual excuse that the lawyer is too busy, but is to cover emergency situations only. Prowswood, Inc. v. Mountain Fuel Supply Co., 676 P.2d 952 (Utah 1984).

The time for filing an appeal is jurisdictional and ordinarily cannot be enlarged. State v. Montoya, 825 P.2d 676 (Utah Ct. App. 1991).

—Amendment or modification of judgment.

If an amendment or modification does not change the substance or character of a judgment, it does not enlarge the time for appeal. Nielson v. Gurley, 252 Utah Adv. Rep. 49 (Utah Ct. App. 1994).

Filing of notice.

The mailing of a notice of appeal was not equivalent to a filing of notice of appeal. Isaacson v. Dorius, 669 P.2d 849 (Utah 1983).

Filing with county clerk.

Filing with the county clerk was not a timely filing with the juvenile court, where there was no indication when the clerk transmitted a copy of the notice of appeal to the juvenile court, and the original was returned to appellant's counsel. State, In re M.S., 781 P.2d 1287 (Utah Ct. App. 1989).

Final order or judgment.

Where the trial court signed two different judgments but neither party served his prepared judgment on the other party before submitting it to the court, the filing of either judgment would be erroneous, and an appeal taken from either is premature because the judgments are not properly "final." Larsen v. Larsen, 674 P.2d 116 (Utah 1983).

Juvenile court's order for temporary confinement in a youth facility for observation and assessment prior to a final disposition was not a final order, for purposes of appeal, because it did not finally dispose of all issues, including the rights of the juvenile and/or his mother's rights as parental custodian. State, In re T.D.C., 748 P.2d 201 (Utah Ct. App.), cert. denied, 765 P.2d 1278 (Utah 1988).

An unsigned minute entry is not a final judgment for purposes of appeal. A judgment, tolled by a timely post-judgment motion, starts to run on the date when the trial court enters its first signed order denying the motion. Gallardo v. Bolinder, 800 P.2d 816 (Utah 1990).

Post-judgment motions.

Where a post-judgment motion was timely filed under Rule 59(a)(6), U.R.C.P., to upset the judgment, and notices of appeal from the judgment were filed after the motion was made, but before the disposition of the motion, the motion rendered the notices of appeal ineffective, and notice of appeal had to be filed within the required time from the date of the entry that disposed of the motion. U-M Invs. v. Ray, 658 P.2d 1186 (Utah 1982).

The time for appeal of an order confirming an arbitrator's award runs from the order denying appellant's timely motion to alter or amend that judgment under Rule 59, U.R.C.P. Robinson & Wells v. Warren, 669 P.2d 844 (Utah 1983).

The Supreme Court may not consider an appeal from the dismissal of a complaint for unpaid overtime compensation until the trial court has had an opportunity to review the order in question by ruling on all pending post-judgment motions. Bailey v. Sound Lab, Inc., 694 P.2d 1043 (Utah 1984).

A notice of appeal filed before the disposition of a proper post-judgment motion is ineffective